No. 74-884

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPHINE M. POWELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 501 F.2d 1136.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 7, 1974. The court of appeals permitted the government to file an untimely petition for rehearing and suggestion for rehearing

en banc (App. C, *infra*), and it was denied on November 21, 1974 (App. D, *infra*). By order of December 13, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statute prohibiting the mailing of firearms "capable of being concealed on the person" is unconstitutionally vague on its face.

STATUTE AND REGULATION INVOLVED

18 U.S.C. 1715 provides in relevant part:

> Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe, [to enumerated recipients]. * * *

39 C.F.R. 124.5 provides in relevant part:

> (a) *Nonmailable firearms.* (1) Pistols, revolvers, and other similar firearms capable of being concealed on the person, addressed to persons other than those indicated in § 124.5(b), are nonmailable.
>
> * * * * *
>
> (4) The phrase "all other firearms capable of being concealed on the person" includes, but is not limited to, short-barreled shotguns, and short-barreled rifles.

(5) The term "short-barreled shotguns" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. A short-barreled shotgun of greater dimensions may also be regarded as nonmailable when they [*sic*] have characteristics allowing them to be concealed on the person.

* * * * *

STATEMENT

On February 28, 1973, Mrs. Theresa Bailey received in the mail a package addressed to her residence in Tacoma, Washington, and mailed from Spokane, Washington (Tr. 7-10, 14). This package contained two shotguns, shotgun shells and hacksaw blades (Tr. 14). Mrs. Bailey, not knowing who had sent the package, contacted her husband, an inmate in McNeil Island Federal Penitentiary (Tr. 6, 7).[1] He assured her that he had not sent, and had no knowledge of, the package (Tr. 20).

The contents of the package were turned over to an agent of the Federal Bureau of Investigation and an official of the penitentiary (Tr. 21-22). An investigation disclosed that one of the shotguns had been purchased by respondent in Spokane on February 21, 1973 (Tr. 266-267), and that the other had been purchased on the same date by a woman meet-

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[1] Respondent's common law husband, Travis Powell, also was incarcerated in McNeil Island (Tr. 460, 466).

ing the general description of respondent (Tr. 277-282).

On March 9, 1973, Mrs. Bailey received a telephone call from an unknown woman, advising her that "a second package was coming, and it was a mistake" (Tr. 24). The caller requested Mrs. Bailey to give the second package to "Sally", but Mrs. Bailey responded that she "did not have an address or any way of giving it to Sally" (*ibid.*). An investigation determined that this telephone call had been placed from respondent's residence in Spokane (Tr. 263, 328, 501).

Mrs. Bailey received the second package in the mail on March 13 (Tr. 25-26). She gave the package to the investigating agents without opening it (Tr. 58, 110); the return address was that of respondent (Tr. 28, 229, 262, 501).[2] This second package contained a sawed-off shotgun with a barrel length of 10 inches and an overall length of 22⅛ inches (Tr. 339), together with two boxes of shotgun shells.

Respondent was indicted on a single count of mailing a firearm capable of being concealed on the person, in violation of 18 U.S.C. 1715. She was convicted after a jury trial in the United States District Court for the Eastern District of Washington and sentenced to a term of two years' imprisonment.

The court of appeals reversed (App. A, *infra*). In a brief opinion, the court concluded that the pro-

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[2] A handwriting expert testified that, in his opinion, respondent had written the address on the second package (Tr. 356).

vision of the statute forbidding the mailing of weapons "capable of being concealed on the person" is unconstitutionally vague. The court wondered:

> Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissible vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity. [App. A, *infra*, pp. 2a-3a.]

Finally, the court suggested (App. A, *infra*, p. 3a) that because Congress could have drawn a more specific statute by using numerical definitions it was forbidden to follow any other course.

REASONS FOR GRANTING THE WRIT

The court of appeals has held that the portion of 18 U.S.C. 1715 prohibiting the mailing of firearms capable of being concealed on the person is unconstitutional on its face. In reaching this result the court overlooked the settled principle, reaffirmed last term in *Parker* v. *Levy*, No. 73-206, decided June 17, 1974, that an ordinary criminal statute such as that here under consideration may not be attacked on its face by one whose conduct is properly subject to its terms. The court of appeals' erroneous invalidation of an Act of Congress on constitutional grounds warrants review by this Court.

Although Section 1715 does not specify how large a weapon must be before it is no longer "capable of being concealed on the person," some weapons are clearly within the statute's prohibition no matter how the quoted phrase is construed. The statute therefore has some constitutional application free of any assertion of vagueness, and it was improper for the court of appeals to conclude that it was void on its face. The statute's potential for uncertain application to larger weapons properly may be considered only if an appropriate case arises.

1. One of the most firmly established principles of constitutional adjudication is that a litigant properly subject to a statute's command may not contend that it is vague or overbroad as applied to others.[3] In the case of a criminal statute not affecting First Amendment interests,

> [t]he strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

United States v. *National Dairy Products Corp.*, 372 U.S. 29, 32.

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[3] Because of the possibility of a "chilling effect" on protected speech, this Court has been more willing to entertain facial vagueness claims in First Amendment cases. However, no freedom of speech issue arises here, and even in First Amendment cases those whose acts are within the absolute core of the statute's prohibition cannot mount a facial attack. *Smith* v. *Goguen*, 415 U.S. 566, 577-578; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608.

If there is any class of offenses within the statute that properly is subject to prohibition, "the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. [Citations omitted.] And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *United States* v. *Harriss*, 347 U.S. 612, 618. Or, to put the matter a slightly different way, "None of [the standards by which vagueness is tested] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, *supra*, slip op. pp. 21-22.

Under these principles, the court of appeals was not at liberty to consider respondent's facial challenge to Section 1715. The court was required, first, to ascertain whether the statute intelligibly prohibited at least some conduct[4] and, second, to consider whether, in light of that core of prohibited activities

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[4] A facial attack might be maintainable against a statute that is so vague that "no standard of conduct is specified at all." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614. See also *Lanzetta* v. *New Jersey*, 306 U.S. 451. But the court of appeals did not conclude that this statute provided utterly no guidance to any potential offender; it held no more than that it was uncertain in its application to some weapons.

and respondent's conduct, the statute could give adequate notice that her acts were forbidden. The court of appeals erred by failing to restrict its consideration to the validity of the statute as applied to respondent. A statute may not be upset on an allegation of vagueness as long as it leaves little doubt as to its application to the particular case. *Cameron* v. *Johnson*, 390 U.S. 611, 616.[5]

2. We submit that Section 1715 properly gave notice that at least some sawed-off shotguns were not mailable. A sawed-off shotgun with a 10 inch barrel is readily recognizable as a weapon capable of being concealed on the person.[6] The statute does not require that the weapon actually be concealed, but simply

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[5] Nor is there support for the court's apparent belief that Congress is required to adopt the most precise statute possible. It is sufficient if the statute as enacted enables a person to determine the legality of his proposed course of conduct; the availability of more precise rules is irrelevant.

[6] The Postal Service has promulgated regulations providing that short-barreled shotguns are "firearms" (39 C.F.R. 124.5 (a) (4)) and that they will be regarded as "capable of being concealed on the person" if they have a barrel length of less than 18 inches and an overall length of less than 26 inches (39 C.F.R. 124.5(a) (5)). Although the regulation provides that larger shotguns also may not be mailed if they have special characteristics making them concealable, the objective numerical definitions are helpful in delimiting that area (well within the statute's outer perimeter) in which there is no difficulty in ascertaining the statute's meaning. Cf. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110.

The government did not direct the court's attention to this regulation until its petition for rehearing; however, the court was required by 44 U.S.C. 1507 to take judicial notice of the regulation regardless of the government's neglect.

that it be "capable" of being concealed. Such a short weapon is "capable" of being concealed (under a jacket or coat, or even in a hand bag) by a person determined to conceal it. Indeed, such a weapon has been sawed off precisely in order to facilitate such concealment. Because the phrase "capable of being concealed on the person" has a clear, unambiguous core meaning, the court of appeals could not reverse respondent's conviction on vagueness grounds unless it determined that the statute was impermissibly vague in its application to the shotgun that she mailed. That issue should be passed upon in the first instance by the court of appeals, and accordingly we have not presented it in our petition as a question for decision by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JEROME M. FEIT,
RICHARD S. STOLKER,
Attorneys.

JANUARY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPHINE M. POWELL, DEFENDANT-APPELLANT

[August 7, 1974]

Appeal from the United States District Court for the Eastern District of Washington

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OPINION

Before: MERRILL and ELY, Circuit Judges, and REAL,* District Judge

PER CURIAM:

Appellant was convicted of a violation of 18 U.S.C. § 1715 for depositing in the United States mail a firearm capable of being concealed on the person, to wit: A sawed-off shotgun.

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* Honorable Manuel L. Real, United States District Judge, Central District of California, sitting by designation.

18 U.S.C. § 1715 provides in its pertinent part:

> "Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable. . . . Whoever knowingly deposits for mailing or delivery or knowingly causes to be delivered by mail according to the direction thereon . . . any pistol, revolver, a firearm declared nonmailable by this section . . . shall be fined not more than $1000 or imprisoned not more than two years, or both."

Appellant attacks her conviction on the basis that 18 U.S.C. § 1715, insofar as it encompasses ". . . firearms (other than revolvers and pistols) capable of being concealed on the person," is unconstitutionally vague in violation of the Fifth Amendment due process. We agree.

Although little question can be raised as to the concealability on the person of a pistol or revolver in common recognition of the normal limits of their size, the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence. Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The statute refers to "firearms capable of being concealed on the person . . ." Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissi-

ble vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity.

To require Congress to delimit the seize of the firearms (other than pistols and revolvers) that it intends to declare unmailable is certainly to impose no insurmountable burden upon it; and its failure to do so is an infirmity in draftsmanship of constitutional proportions.[1]

Having decided the unconstitutional vagueness of this statute as it is applied to "other firearms," we need not reach the other asignments of error made by appellant.

The judgment is reversed.

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[1] Innumerable State legislatures have met the challenge. *See, e.g.*, California Penal Code § 12001; Oregon Revised Statutes § 166.210; Revised Code of Washington § 9.41.010.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1252

DC C-9634

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPHINE M. POWELL, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Eastern District of Washington

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A True Copy
Attest 1/10/75

EMIL E. MELFI, JR., Clerk

by /s/ Ray Hewitt
RAY HEWITT, Senior Deputy

Filed and entered August 7, 1974

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed Nov. 4, 1974, Clerk, U. S. Court of Appeals]

No. 74-1252

UNITED STATES OF AMERICA, APPELLEE

vs.

JOSEPHINE M. POWELL, APPELLANT

ORDER

Before: MERRILL and ELY, Circuit Judges, and REAL, District Judge

The motion for stay of mandate and permission to file late motion for rehearing and suggestion for rehearing in banc may be filed.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed Nov. 21, 1974, Clerk, U. S. Court of Appeals]

No. 74-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

JOSEPHINE M. POWELL, DEFENDANT-APPELLANT

ORDER

Before: MERRILL and ELY, Circuit Judges, and REAL, District Judge

Appellant's motion to dismiss appellee's petition for rehearing and suggestion for rehearing in banc is denied, consistent with our earlier order permitting the filing of that petition.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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